

MEMORANDUM FOR: Regional Administrators

FROM: F - William T. Hogarth, Ph.D.

SUBJECT: Guidance for Developing Environmental Impact Statements for Essential Fish Habitat per the AOC v. Daley Court Order

This memorandum provides detailed guidance for developing Environmental Impact Statements (EISs) for the essential fish habitat (EFH) fishery management plan (FMP) amendments affected by the September 14, 2000 AOC v. Daley court order. The guidance addresses major issues related to developing the EISs, but it is not a substitute for other applicable references such as the Council on Environmental Quality (CEQ) regulations for implementing the National Environmental Policy Act (40 CFR 1500-1508), CEQ's Forty Most Asked Questions Concerning the National Environmental Policy Act Regulations (46 FR 18026), and NOAA Administrative Order 216-6 ("Environmental Review Procedures for Implementing the National Environmental Policy Act").

The court order enjoins NMFS from enforcing the EFH FMP amendments until NMFS has completed thorough Environmental Assessments (EAs) or EISs for the amendments. Following advice from NOAA General Counsel and the Department of Justice, NMFS will prepare EISs rather than EAs. To comply with the court order and NEPA, NMFS must ensure that the new EISs include an unbiased evaluation of alternatives, even though the court did not overturn NMFS' approval of the FMP amendments under the Magnuson-Stevens Act. Therefore, NMFS must conduct scoping meetings and consider public comments to ensure that the EISs are comprehensive. Based on the new analyses, NMFS may or may not conclude that an alternative other than the option originally approved by NMFS should be adopted. If an EIS indicates that an alternative other than those included in the original EFH FMP amendments is warranted, NMFS will work with the applicable Council to develop a new FMP amendment consistent with that alternative.

Affected FMPs

The AOC v. Daley court order concerns EFH FMP amendments developed by the Gulf of Mexico, Caribbean, New England, Pacific, and North Pacific Fishery Management Councils. For the Pacific Council, the court order affects only the groundfish FMP since that was the only FMP challenged and it relied on its own EA. The other four Councils developed omnibus FMP amendments and EAs covering multiple FMPs. Although for particular Councils the plaintiffs only challenged some of those FMPs, all of the FMPs covered by the EAs are affected by the court order, because the EAs share the same deficiencies with respect to all of the FMPs. Thus, the EFH provisions of the following 22 FMPs must be addressed in new EISs:

Gulf of Mexico Council:	shrimp, red drum, reef fish, coastal migratory pelagics, stone crab, spiny lobster, coral and coral reefs
Caribbean Council:	reef fish, spiny lobster, queen conch, coral
New England Council:	multispecies, scallops, salmon, monkfish, herring
Pacific Council:	groundfish
North Pacific Council:	Bering Sea and Aleutian Islands groundfish, Gulf of Alaska groundfish, king and tanner crabs, scallops, salmon

General Approach

NMFS' compliance with this court order should be handled in a manner that is compatible with an overall attempt to improve the comprehensiveness of NEPA analyses for FMPs. In some cases it may be most efficient to combine the new EFH NEPA analysis with other EISs that are being developed for specific

fisheries. Regional Administrators should evaluate other anticipated NEPA analyses for the affected Councils' FMPs and determine whether to handle the EFH NEPA analysis separately or in combination with another EIS. For any of the affected fisheries, if it is not practicable to combine the EFH NEPA analysis with another EIS in the very near future, the EFH EIS must proceed separately. In such cases, a single EFH EIS should address EFH issues for all affected FMPs for each Council.

Actions that Must Be Addressed in the EISs

The plaintiffs in AOC v. Daley challenged whether, among other things, NMFS had adequately evaluated the effects of fishing on EFH and minimized to the extent practicable the adverse effects of fishing on EFH. The court found that the EAs prepared for the amendments were inadequate and did not restrict its criticism to the portions of the EAs concerning fishing impacts. NOAA General Counsel and the Department of Justice have advised NMFS that the scope of the new EISs must cover all of the required EFH components of FMPs as described in section 303(a)(7) of the Magnuson-Stevens Act. Therefore, the proposed action to be addressed in the EISs is the development of the mandatory EFH provisions of the affected FMPs, and the EISs cannot presuppose what action the agency might ultimately take. The EISs must examine options for designating EFH as well as minimizing the adverse effects of fishing on EFH.

Notice of Intent

NMFS must publish in the Federal Register a notice of intent to prepare each EIS, as required by 40 CFR 1501.7 and NAO 216-6. The notice must describe the proposed action and possible alternatives, summarize the proposed scoping process (including logistics for scoping meetings), and provide the name and address of a person in the agency who can answer questions about the proposed action and EIS.

Scoping Process

NMFS, in cooperation with the affected Council, should conduct one or more public scoping meetings for each EIS to inform interested parties of the proposed action and alternatives, and to solicit comments on the range and type of analysis to be included in the EIS. NMFS should document for the administrative record all written and verbal comments received during the scoping meetings.

Range of Alternatives

To comply with NEPA and the court order, the EISs must evaluate a reasonable range of alternatives for developing the mandatory EFH provisions of the affected FMPs. These alternatives must include the alternative that was approved in the applicable EFH FMP amendments, the no action alternative (which, according to the Department of Justice, must be no EFH designations), and other reasonable alternatives. The court found that the fact that the Secretary can only approve, disapprove, or partially approve what was submitted by a Council does not restrict the number of alternatives that must be considered under NEPA. The court pointed out that NMFS could develop Secretarial FMP amendments to implement one or more alternatives that have not been adopted by a Council.

For the designation of EFH, the analysis should include alternative ways of identifying EFH, such as alternative sizes, locations, and/or habitat types that could comprise the EFH designation. For the identification of Habitat Areas of Particular Concern (HAPC), the analysis should discuss alternative areas or different approaches that could be used to designate HAPCs. For the minimization of fishing impacts, the

alternatives analysis should identify a range of approaches that could be taken to minimize the adverse effects of fishing on EFH. If information is lacking on the effects of specific fishing practices on EFH, the analysis should examine alternatives that could be taken in the face of that uncertainty. For example, the range of alternatives might include extremely precautionary measures (e.g., banning specific gear types), taking no action without more definitive evidence of adverse effects, and two or three intermediate alternatives (i.e., measures that are somewhat precautionary but not draconian). Again, the selected range of alternatives should be informed by comments NMFS receives during the scoping process.

Affected Environment

The section of the EISs describing the affected environment should discuss the physical and biological environment in which the managed species occur and the socioeconomic characteristics of the fisheries. This section should also describe the administrative context, i.e., characterize the way the FMP regulates the fishery, mention that NMFS adopted EFH amendments to the FMPs, and note that this NEPA analysis is supplementing the EAs prepared for those amendments. The description of the affected environment should be no longer than is necessary to understand the effects of the alternatives.

Environmental Consequences

The court's opinion specifically criticized the EAs for describing alternatives but not analyzing them or explaining their environmental impacts. Therefore, for each type of action (designating EFH, designating HAPCs, and minimizing the effects of fishing on EFH) the EISs must identify a range of alternatives and also provide a comparative evaluation of the effects of those alternatives.

Since the focus of AOC v. Daley was the effects of fishing on EFH, the portion of the EISs dealing with options to address fishing impacts is most important. The EFH regulations state that "Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing practice is having an identifiable adverse effect on EFH" based on the Council's evaluation of potential fishing impacts (50 CFR 600.815(a)(3)(iii)). The preamble to the EFH interim final rule clarifies that in this context, "identifiable" impacts are those that are both more than minimal and not temporary in nature (62 FR 66538). If there is evidence that a fishing practice may be having an identifiable adverse effect on EFH, and/or if the available information is unclear as to whether there may be an adverse impact that is both more than minimal and not temporary in nature, for NEPA purposes the analysis of alternatives needs to consider explicitly a range of management measures for minimizing potential adverse effects, and the practicability and consequences of adopting those measures. In other words, if there is evidence that a fishing practice may be having an identifiable adverse effect on EFH, even if there is no conclusive proof of adverse effects, it is not sufficient to conclude *prima facie* that no new management measures are necessary without first conducting a reasonably detailed alternatives analysis.

Considering New Information

Although the EFH FMP amendments were completed in 1998, the EISs need to evaluate the proposed action in the context of the best scientific information that is available today. Therefore, it may be necessary to update the literature reviews, data analyses, and other syntheses of information that were used to develop the amendments.

Combining the Analysis with Work to Remedy Partially Approved EFH Amendments

NMFS did not approve portions of the EFH FMP amendments submitted by the Gulf of Mexico and Caribbean Councils in 1998. (NMFS also did not approve portions of the Mid-Atlantic Council's EFH FMP amendments, but those are not directly affected by the court order.) To address these partial approvals and take advantage of the new NEPA process, the EISs for those Councils should provide the information necessary to bring the FMPs into compliance with the Magnuson-Stevens Act. Remedying the partial approvals is not required by the court order, but this NEPA analysis provides an efficient and logical avenue to fix the deficiencies in the amendments.

For the Gulf of Mexico Council, the amendment identified EFH based on what the Council deemed to be major or representative species. NMFS disapproved the section of the amendment that failed to provide either explicit EFH designations for the remaining managed species or a clear scientific justification for designating EFH based on species assemblages. NMFS also disapproved the portions of the fishing gear impact assessment that failed to evaluate the effects of fishing gears other than trawls, recreational fishing, and traps.

For the Caribbean Council, the amendment identified EFH based on what the Council deemed to be major or representative species. NMFS disapproved the section of the amendment that failed to provide either explicit EFH designations for the remaining managed species or a clear scientific justification for designating EFH based on species assemblages.

Using the EISs to Review and Revise Information Contained in the EFH Amendments

The EFH regulations at 50 CFR 600.815(a)(11) state that Councils and NMFS should periodically review and revise the EFH components of FMPs, including annual reviews as part of the annual Stock Assessment and Fishery Evaluation report, and a complete review at least once every 5 years. To the extent feasible, NMFS should use the new NEPA process as the vehicle for reviewing and revising the information contained in the original EFH FMP amendments. Such a review should include information regarding the description and identification of EFH, threats to EFH from fishing and non-fishing activities, and measures that could be taken to minimize those threats.

Additional Information and Assistance

Certain sections and information needs for the EISs will be common for the five Councils, so it would be efficient to have these common needs addressed once nationally and shared with the Regions for adaptation and inclusion in the EISs for each Council. Therefore, the Office of Habitat Conservation will draft an updated synopsis of available information regarding the effects of fishing on fish habitat, and will share that narrative with the Regions. Regions can then add regional information on the effects of fishing and tailor the text as needed to fit specific fisheries. The Office of Habitat Conservation also will draft a generic "purpose and need" section explaining the purpose of and need for the EISs, which Regions can adapt as appropriate. If Regions identify other portions of the EISs that will be common to all five Councils and could be written at a national level, they should contact the Office of Habitat Conservation.

Suggested Outline

A suggested outline for the EISs is attached. This outline is intended to convey the scope and content of the required EFH NEPA analyses, but it may need to be adapted to address any unique issues associated with particular Councils or fisheries. If the EFH issues will be handled through a broader NEPA analysis for a given fishery, the information in the outline can be combined with the outline for the broader EIS.

Questions

Please contact Jon Kurland in the Office of Habitat Conservation (301-713-2325) or Mary O'Brien in NOAA General Counsel (301-713-2231) with any questions regarding this guidance or compliance with the court order.

Attachment

SUGGESTED OUTLINE FOR THE NEW EFH EISs

Note: If the EFH information is being combined with a broader NEPA analysis of the fishery, this information could be combined with the outline for the broader EIS.

Executive Summary

1 Purpose and Need for Action

- 1.1 Specify the purpose and need for the action
- 1.2 Explain that the proposed action, and thus the scope of the EIS, is the development of the mandatory EFH provisions of the affected FMPs pursuant to section 303(a)(7) of the Magnuson-Stevens Act
- 1.3 Explain any other EAs/EISs, court orders, etc. influencing the scope
- 1.4 Explain the decisions that must be made, the organizations (e.g., Councils) involved in the NEPA analysis, and the possibility that FMP revisions could result from the EIS
- 1.5 Summarize the scoping process and explain the significant issues
 - 1.5.1 EFH and HAPC designations
 - 1.5.2 Minimizing the effects of fishing on EFH
 - 1.5.3 Other issues
- 1.6 Preview the following chapters

2 Alternatives Including the Proposed Action

- 2.1 Describe the range of alternatives, including the preferred action, no action, and a reasonable range of other alternatives
 - 2.1.1 EFH designations (for each alternative describe the methodology used, geographic scope, habitat types, etc.)
 - 2.1.1.1 Alternative 1
 - 2.1.1.2 Alternative 2
 - 2.1.1.3 Alternative 3
 - 2.1.1.4 Alternative 4
 - 2.1.1.5 Alternative 5
 - 2.1.2 HAPC designations (for each alternative describe the methodology used, geographic scope, habitat types, etc.)
 - 2.1.2.1 Alternative 1
 - 2.1.2.2 Alternative 2
 - 2.1.2.3 Alternative 3
 - 2.1.2.4 Alternative 4
 - 2.1.3 Minimizing the effects of fishing on EFH
 - 2.1.3.1 Alternative 1
 - 2.1.3.2 Alternative 2
 - 2.1.3.3 Alternative 3
 - 2.1.3.4 Alternative 4
 - 2.1.3.5 Alternative 5
 - 2.1.3.6 Alternative 6

- 2.2 Describe any other alternatives that were considered but eliminated from detailed study, and explain why they were not evaluated further
 - 2.2.1 EFH designations
 - 2.2.2 HAPC designations
 - 2.2.3 Minimizing the effects of fishing on EFH

3 Affected Environment

- 3.1 Physical environment
- 3.2 Biological environment
 - 3.2.1 Fishery resources
 - 3.2.2 Threatened and endangered species and marine mammals
 - 3.2.3 EFH for other fisheries
 - 3.2.4 Other biological resources
- 3.3 Description of the fishery
 - 3.3.1 Geographic extent
 - 3.3.2 Number of vessels, types of gear used, etc.
 - 3.3.3 Socioeconomic characteristics
- 3.4 Administrative context
 - 3.4.1 How the fishery is managed under the FMP
 - 3.4.2 Description of the EFH amendment to the FMP
- 3.5 General analysis of the effects of fishing on fish habitat
 - 3.5.1 National and international studies and literature
 - 3.5.2 Region-specific and fishery-specific information

4 Environmental Consequences

- 4.1 Comparison of alternatives for the designation of EFH
 - 4.1.1 Alternative 1
 - 4.1.1.1 Description of the alternative
 - 4.1.1.2 Advantages and disadvantages of the alternative
 - 4.1.1.3 Consequences of the alternative
 - 4.1.1.3.1 Effects on the fishery
 - 4.1.1.3.2 Effects on other fisheries
 - 4.1.1.3.3 Effects on protected species
 - 4.1.1.3.4 Effects on non-fishing activities
 - 4.1.1.3.5 Other effects
 - 4.1.2 Alternative 2 (with subsections as above)
 - 4.1.3 Alternative 3 (with subsections as above)
 - 4.1.4 Alternative 4 (with subsections as above)
 - 4.1.5 Alternative 5 (with subsections as above)
- 4.2 Comparison of alternatives for the designation of HAPCs
 - 4.2.1 Alternative 1
 - 4.2.1.1 Description of the alternative
 - 4.2.1.2 Advantages and disadvantages of the alternative
 - 4.2.1.3 Consequences of the alternative
 - 4.2.1.3.1 Effects on the fishery
 - 4.2.1.3.2 Effects on other fisheries
 - 4.2.1.3.3 Effects on protected species
 - 4.2.1.3.4 Effects on non-fishing activities
 - 4.2.1.3.5 Other effects
 - 4.2.2 Alternative 2 (with subsections as above)

- 4.2.3 Alternative 3 (with subsections as above)
- 4.2.4 Alternative 4 (with subsections as above)
- 4.3 Comparison of alternatives for minimizing the effects of fishing on EFH
 - 4.3.1 Alternative 1
 - 4.3.1.1 Description of the alternative
 - 4.3.1.2 Advantages and disadvantages of the alternative
 - 4.3.1.3 Consequences of the alternative
 - 4.3.1.3.1 Effects on EFH
 - 4.3.1.3.2 Effects on the fishery
 - 4.3.1.3.3 Effects on other fisheries
 - 4.3.1.3.4 Effects on protected species
 - 4.3.1.3.5 Other effects
 - 4.3.2 Alternative 2 (with subsections as above)
 - 4.3.3 Alternative 3 (with subsections as above)
 - 4.3.4 Alternative 4 (with subsections as above)
 - 4.3.5 Alternative 5 (with subsections as above)
 - 4.3.6 Alternative 6 (with subsections as above)

5 List of Preparers

6 Agencies, Organizations, and Individuals Consulted

7 Index

8 Appendices (if any)